314 U.S. 661

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FILED
AUG 28 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 563

A. C. CARSTENS, THOMAS A. LANDRETH, V. R. HYSLOP, H. H. HIGGINS AND THE WASHINGTON WATER POWER COMPANY, A CORPORATION,

Petitioners,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF LINCOLN COUNTY, A MUNICIPAL CORPORATION; JOHN LOME, A COMMISSIONER THEREOF; LOUIS SCHULTZ, A COMMISSIONER THEREOF; AND A. H. REILLY, A COMMISSIONER THEREOF.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON, AND BRIEF IN SUPPORT THEREOF.

ANTONE E. RUSSELL,
HENRY E. T. HERMAN,
Counsel for Petitioners.

ALAN G. PAINE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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No. 563

A. C. CARSTENS, THOMAS A. LANDRETH, V. R. HYSLOP, H. H. HIGGINS AND THE WASHINGTON WATER POWER COMPANY, A CORPORATION,

Petitioners,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF LINCOLN COUNTY, A MUNICIPAL CORPORATION; JOHN LOME, A COMMISSIONER THEREOF; LOUIS SCHULTZ, A COMMISSIONER THEREOF; AND A. H. REILLY, A COMMISSIONER THEREOF.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON, AND BRIEF IN SUPPORT THEREOF.

The petitioners, A. C. Carstens, Thomas A. Landreth, V. R. Hyslop, H. H. Higgins and The Washington Water Power Company, a corporation, pray that a writ of certiorari issue to review the judgment entered in the Supreme Court of the State of Washington, the highest Court of said State, in the above entitled matter, which judgment is

entered upon an opinion not yet officially reported, but which has been printed in 108 Wash. Dec. 90, and in 111 Pac. (2d) 583.

Summary Statement of the Matter Involved.

The petitioners A. C. Carstens, Thomas A. Landreth and V. R. Hyslop are resident taxpayers and voters of Spokane County, Washington. The petitioner H. H. Higgins is a resident voter and taxpayer in the City of Hartline, Grant County, Washington. The petitioner The Washington Water Power Company is a Washington corporation at the present time engaged in the business of selling electricity in various parts of the State of Washington, including those areas in which the other petitioners live and purchase electric current.

The respondent Public Utility District No. 1 of Lincoln County is a municipal corporation organized under the laws of the State of Washington for the purpose of selling and distributing electric power. Its territorial limits are co-extensive with the boundaries of Lincoln County. The other respondents are the commissioners of the said Public Utility District.

The petitioners brought suit as plaintiffs in the Superior Court of the State of Washington seeking to enjoin the respondents from proceeding with a condemnation suit whereby the respondent public utility district was attempting to condemn distribution lines and facilities for selling electric current outside of its territorial limits in the areas where the individual petitioners reside and purchase electric current. The Superior Court granted the plaintiffs (petitioners here) an injunction enjoining the public utility district and the commissioners thereof from proceeding with their attempt to condemn distributing lines and facilities of the petitioner The Washington Water Power Company in areas outside the territorial limits of said public

utility district (R. 54). The judgment of the Superior Court granting the plaintiffs the relief prayed for was appealed to the Supreme Court of Washington. That decision was reversed by the Supreme Court and a final judgment denying plaintiffs (petitioners here) the relief sought was entered (R. 142). The opinion of the Supreme Court of Washington upon which such judgment was entered is not yet officially reported, but is printed in 108 Wash. Dec. 90, and in 111 Pac. (2d) 583. This judgment of the Supreme Court of the State of Washington petitioners seek to have reviewed here.

Jurisdictional Statement.

Statutory Provisions Believed to Sustain Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A., Section 344 (b), Judical Code, Sec. 237, Amended, (R. S. secs. 690, 709; Mar. 3, 1911, c. 231, secs. 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 937).

State Statute Involved

The validity of Remington's Revised Statutes, Section 11610 (d), Laws of Washington, 1931, Section 6, pp. 12, 13, as construed by the Supreme Court of the State of Washington in its opinion not yet officially reported, but set forth in 108 Wash. Dec. 90, and in 111 Pac. (2d) 583, a copy of which opinion is appended hereto (R. 110-123), and in the final judgment of said Supreme Court (R. 142) was drawn in question and upheld by that Court. That section purports to give to a public utility district the following power:

> "To purchase, within or without its limits, electric current for sale and distribution within or without its

limits, and to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam or other methods, within or without its limits, for the purpose of furnishing said public utility district, and the inhabitants thereof and any other person, including public and private corporations, within or without its limits, with electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service charges and price thereof, free from the jurisdiction and control of the director of public works and division of public utilities, in all things, * * * Provided, That it must at all times first make adequate provision for the needs of the district, both actual and prospective."

Date of Judgment.

The date of the judgment of the Supreme Court of Washington (which is the highest court of that State) which it is sought to have reviewed is July 11, 1941.

Nature of the Case and of the Rulings of the Court.

The petitioners A. C. Carstens, Thomas A. Landreth and V. R. Hyslop are resident taxpayers and voters of Spokane County, Washington (R. 89-90). Petitioner H. H. Higgins is a resident voter and taxpayer in the City of Hartline, Grant County, Washington (R. 96). The petitioner The Washington Water Power Company is a Washington corporation at the present time engaged in the business of selling electricity in various parts of the State of Washington, including those areas in which the other petitioners live and purchase electric current (R. 94-95).

Respondent public utility district is a municipal corporation organized and existing under the laws of the State of

Washington for the purpose of selling and distributing electric power (R. 1, 47). Its territorial limits are coextensive with the boundaries of Lincoln County. The other respondents are commissioners of said Public Utility District No. 1 of Lincoln County (R. 77-78).

Petitioners brought suit as plaintiffs in the Superior Court of the State of Washington, seeking to enjoin the respondents from proceeding with a condemnation suit whereby the respondent public utility district was attempting to condemn distribution lines and facilities for selling electric current outside its territorial limits in the areas where the individual petitioners reside and purchase electric current (R. 1).

Hartline, Washington, is in Grant County outside the territorial limits of Public Utility District No. 1 of Lincoln County. The distributing lines and facilities which supply electric current to the City of Hartline, Washington, are owned by The Washington Water Power Company (R. 64-65).

Those petitioners who are resident voters and taxpayers of Spokane County, Washington, are served by distribution lines and facilities owned by petitioner The Washington Water Power Company in a rural section of Spokane County. Along with other residents of their neighborhood, they are supplied with electric current by their joint petitioner, The Washington Water Power Company (R. 90).

All petitioners other than The Washington Water Power Company are voters and taxpayers in the counties in which they reside (R. 89-90, 96).

Petitioners believe that the Supreme Court of Washington in the judgment, the review of which is here sought, held valid and constitutional a statute which petitioners assert and believe violated Section 1 of the Fourteenth Amendment to the United States Constitution.

It is believed by petitioners the following cases sustain the jurisdiction of the Supreme Court of the United States:

Boston & Maine Railway Company v. *Arnburg*, 285 U. S. 234, 52 S. C. 336, 76 L. Ed. 729;
Union Bank & Trust Company v. *Phelps*, 288 U. S. 181, 53 S. Ct. 321, 77 L. Ed. 687.

Grounds for Contention Questions Involved are Substantial.

The Federal questions hereinafter set forth and involved in this suit are substantial. We believe they have never been passed upon by the Supreme Court of the United States. They have to do with the asserted right of a public utility district to acquire and thus remove from the tax rolls (property of municipal corporations being exempt from taxation by virtue of Amendment Fourteen, Washington Constitution) distributing lines and facilities for selling electricity in counties and cities outside the territorial limits of said utility district; to deprive petitioners (without submitting the question to the vote of petitioners and their fellow voters) of the privilege which they enjoy at the present of purchasing their electric current from a taxpayer selling the same under regulations of the State Department of Public Service (public utility districts are by the terms of the statute questioned exempt from control of rates by Department of Public Service), and by requiring petitioners to depend for electrical service upon the public utility district controlled, conducted and managed by commissioners elected by the voters of a district at elections in which petitioners and all other voters residing in the areas served outside the utility district are deprived of the right to vote.

Time, Manner and Method of Raising Federal Questions.

The petitioners herein, as plaintiffs, anticipated when they filed their complaint in the Superior Court, that the

statute in question might be construed by the courts of Washington as it was construed by the Supreme Court of that state in the decision which appellants are seeking to have reviewed. They claimed in their complaint the protection of the Fourteenth Amendment to the United States Constitution by use of the following language:

> "That insofar as Chapter 1, Laws of Washington, 1931, may be construed to be an attempt to authorize public utility districts formed under and by virtue of said chapter to acquire works, plants, transmission and distribution lines for the sale and distribution without the territorial limits of such public utility district and to permit such public utility district to sell, regulate and control the use, distribution, rates, service, charges and price for electric current outside of the territorial limits of such public utility district free from the jurisdiction and control of the Director of the Department of Public Service and the Department of Public Service, it is in violation of the private and pecuniary rights of the plaintiffs herein, in that it offends against, ignores and violates the following constitutional provisions:
>
> " 'No state * * * shall * * * deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'
>
> *Amendment XIV, Constitution of the United States"* (Complaint, R. 8-9).

The complaint filed by petitioners in the superior court, from which the foregoing quotation was taken later became a part of the record before the Supreme Court of Washington.

The Superior Court of the State of Washington, that is, the trial court, gave the statute in question a construction which was not inconsistent with Section 1 of the Fourteenth Amendment to the United States Constitution. It granted judgment (R. 54-56) to petitioners herein in accordance with

its memorandum opinion. A copy of said memorandum opinion is attached hereto. In the course of that opinion the Superior Court said:

> "• • • The formation of such a district is primarily for the purpose of benefiting the people within its boundaries, who had a voice in its establishment and some control over its management. In other words, the people in the District are serving themselves and for such purpose may lawfully acquire facilities or franchises which are reasonably necessary to provide this service. The District may also serve customers outside its boundaries who may freely contract for the purchase of such service. This construction accomplishes the purpose of the law and protects residents outside of the district's territorial limits. It, likewise, prevents the district from condemning and acquiring the facilities used by a public service corporation in serving customers outside of the boundaries of the district. If the Public Utility District acquires all the property reasonably necessary to serve the public it represents, that is, the 'inhabitants thereof,' then, in so doing it has accomplished the main purpose of the law. • • •" (R. 53.)

Appellate procedure in the Supreme Court of the State of Washington is prescribed by statutes and rules of the Supreme Court of Washington. Under the Washington appellate practice, assignments of error are not separately filed, but are set forth in the brief of appellant. See Remington's Revised Statutes, Section 1730, Laws of Washington, 1893, p. 127, section 15; Laws of Washington, 1901, p. 30, section 3. See also, Rules of Supreme Court of Washington, 193 Wash. 24-a.

Petitioners herein did not appeal nor did they cross-appeal from the judgment of the trial court. That appeal was prosecuted by respondents herein (R. 56).

Rule XVI of the Supreme Court of Washington came into effect July 1, 1938. Paragraph 2 of said rule introduced into the Washington appellate practice an innovation, to-wit: a requirement that the brief of appellant should consist of a number of matters, including "statement of questions involved," and that among the matters to be included in the brief of respondents should be "any counter-statement of questions involved including restatement and additional statement". (193 Wash. 24-a.)

Subdivision 4 of said Rule XVI provides:

> "The statement of the questions involved must set forth each question separately, in the briefest and most general terms, without names, dates, amounts, or particulars of any kind, and whenever possible each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified, or not answered by the superior court. * * * The questions and answers in their entirety should not ordinarily exceed one page and must never exceed two pages." (193 Wash. 24-a, 25-a.)

Respondents in their brief filed as appellants in the Supreme Court of the State of Washington, set forth the following assignments of error, pursuant to the requirements of the statutes and rules of the Supreme Court above set forth;

> "1. The Court erred in the making of its memorandum decision.
>
> "2. The Court erred in refusing to dismiss the Complaint.
>
> "3. The Court erred in signing, making and entering its decree restraining petitioner from acquiring certain distribution properties located adjacent to Lincoln County in Spokane and Grant counties." (Certificate, Chief Justice Washington Supreme Court, R. 108.)

Respondents herein, as appellants in the Supreme Court of Washington, made the following statement of question involved:

> "1. Does Chapter 1, Laws of 1931, authorize a public utility district to acquire, in connection with the acquisition by eminent domain of existing electrical transmission and distribution properties located within such district and as incidental to such acquisition, that portion which is located in an adjoining county of distribution lines extending into such adjoining county from a substation located within such district?"

Believing the foregoing statement of question involved to be incorrect, these petitioners as respondents in the Washington Supreme Court, made the following counter-statement of question involved:

> "1. Has a county-wide public utility district formed under Chapter 1 of the Laws of 1931 the right to acquire by condemnation the electrical distribution services, serving customers, even whole cities, located outside of the county and without the consent or approval of such cities or customers?" (Certificate, Chief Justice Washington Supreme Court, R. 109.)

It will be observed that in making this counter-statement of question, counsel for petitioners when thus raising the Federal question involved were limited by the necessity that the statement be made "in the briefest and most general terms, without names, dates, amounts, or particulars of any kind," as required by subdivision 4 of Rule XVI, Rules of the Supreme Court of Washington, 193 Wash. 24-a, 25-a.

Remington's Revised Statutes, Section 1736, Laws of Washington, 1893, Section 21, page 130, provides that in cases before the Washington Supreme Court the cause shall be determined by the record on appeal. No provision exists

in the statutes of Washington or the rules of the Supreme Court of that State whereby the respondent, who does not cross appeal, can raise any question in the course of an appellate proceeding, save by means of the aforementioned Rule XVI, and subject to its limitations.

This cause was argued before Department Two of the Supreme Court of the State of Washington (R. 110). March 25, 1941, Department Two of the Supreme Court of Washington rendered its opinion (R. 110-123). A copy of said departmental opinion is attached hereto. This opinion was not the final judgment of the Washington Supreme Court. See *Puget Sound Power & Light Company* v. *King County*, 264 U. S. 22, 68 L. Ed. 541, 44 Sup. Ct. 261.

This opinion said nothing about the Fourteenth Amendment to the United States Constitution, but disposed of such rights and immunities as petitioners claimed by reason of the Fourteenth Amendment.

After the opinion of Department Two of the Supreme Court was filed, and before judgment was entered by said court, petitioners herein filed a petition requesting the Supreme Court of Washington to pass upon the Federal question involved in the cause (R. 123). This petition was denied June 4, 1941, prior to the entry of final judgment by the Supreme Court of Washington (R. 141). The Supreme Court of Washington entered the final judgment which these petitioners were seeking to have reviewed by certiorari July 11, 1941.

The question whether it was actually necessary for the respondent public utility district to acquire distributing lines and facilities outside of its territorial limits was raised in the complaint (R. 1-11), discussed in the memorandum opinion of the trial court (R. 52-54) and passed upon by the departmental opinion of the Supreme Court of Washington (R. 110-123).

We believe the Federal questions were timely raised in accordance with the rule recognized by the following cases:

People of State of New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 67, 49 S. Ct. 61, 73 L. Ed. 184, 62 A. L. R. 785;

Green Bay & Miss. Canal Co. v. *Patten Paper Co.*, 172 U. S. 58, 67, 68, 19 S. Ct. 97, 43 L. Ed. 364;

Crowell v. *Randell*, 10 Pet. 368, 392, 398, 9 L. Ed. 458;

Furman v. *Nichol*, 8 Wall. 44, 56, 19 L. Ed. 370;

St. Louis, I. M. & S. Ry. Co. v. *Starbird*, 243 U. S. 592, 598, 599, 37 S. Ct. 462, 61 L. Ed. 917;

Neilson v. *Lagow*, 12 How. 98, 109, 110, 13 L. Ed. 909;

Whitney v. *People of State of California*, 274 U. S. 357, 360, 47 S. Ct. 641, 71 L. Ed. 1095;

Powell v. *Supervisors of Brunswick County*, 150 U. S. 433, 440, 14 S. Ct. 166, 37 L. Ed. 1134;

Sayward v. *Denny*, 158 U. S. 180, 184, 15 S. Ct. 777, 39 L. Ed. 941;

Wedding v. *Meyler*, 192 U. S. 573, 581, 24 S. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 833;

Yazoo & M. V. R. Co. v. *Adams*, 180 U. S. 41, 48, 21 S. Ct. 256, 45 L. Ed. 415;

California Bank v. *Kennedy*, 167 U. S. 362, 365, 366, 17 S. Ct. 831, 42 L. Ed. 198;

Dewey v. *Des Moines*, 173 U. S. 193, 199, 19 S. Ct. 379, 43 L. Ed. 665;

Hamilton Mfg. Co. v. *Massachusetts*, 6 Wall. 632, 636, 18 L. Ed. 904;

Oxley Stave Co. v. *Butler County*, 166 U. S. 648, 657, 17 S. Ct. 709, 41 L. Ed. 1149.

Questions Presented.

Does the construction given Laws of Washington, 1931, pp. 12, 13, Remington's Revised Statutes, Section 11610 (d), by the judgment of the Supreme Court of Washington in the

case at bar deprive petitioners of the protection against property being taken without due process of law guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution when such construction permits a public utility district to acquire by condemnation distribution lines and facilities for the distribution of electricity when the effect of such acquisition is to remove valuable property from the tax rolls of the counties in which petitioners live, the said counties being beyond the territorial limits of the public utility district which is permitted to acquire such property and by such acquisition require said property to become tax exempt?

Does the construction given Laws of Washington, 1931, pp. 12, 13, Remington's Revised Statutes, Section 11610 (d), by the judgment of the Supreme Court of Washington in the case at bar deprive petitioners of equal protection of the law guaranteed them by Section 1 of the Fourteenth Amendment to the United States Constitution when such construction permits a public utility district to condemn distribution lines and facilities outside its territorial limits, thereby in effect requiring the resident of such territory to receive their electrical service from a body which is not supervised by the Department of Public Service of the State of Washington as are private companies, or over which they cannot exercise any right of control by the ballot box as can the citizens who live within the territorial limits of the public utility district?

Reasons Relied on for Allowance of the Writ.

We believe that in the case at bar the Federal questions above set forth were fairly presented by the record, were necessary to determination of the cause, and that no adequate non-Federal ground of decision appears in the opinion.

In making the decision sought to be reviewed, the State Supreme Court of Washington has, we believe, decided in

substance Federal questions not previously determined by the Supreme Court of the United States.

There are many public utility districts other than respondent public utility district which have been organized in the State of Washington and in other States of the Union, and it is important that this Court should pass upon the questions hereinbefore set forth.

Conclusion.

We believe the questions which this application suggests should be definitely settled by this Court. Public Utility Districts are now authorized by the laws of several states. There are many in Washington. If notwithstanding the provisions of the Fourteenth Amendment to the Constitution of the United States such municipal corporations have the power to subject residents of areas beyond the territorial limits to the domination of public utilities controlled by voters who do not reside in the areas so dominated, it would be well to have that fact determined by this Court.

Respectfully submitted,

ANTONE E. RUSSELL,
HENRY E. T. HERMAN,
Attorneys for Petitioners.

ALAN C. PAINE,
Of Counsel for Petitioners.

STATE OF WASHINGTON,
County of Spokane, ss:

ANTONE E. RUSSELL and HENRY E. T. HERMAN, being members of the Bar of the Supreme Court of the United States, and counsel for petitioners herein, do hereby certify that the foregoing petition is well founded and not interposed for delay.

ANTONE E. RUSSELL,
HENRY E. T. HERMAN.